STATE OF MICHIGAN
IN THE SUPREME COURT
Appeal from the Court of Appeals

GRIEVANCE ADMINISTRATOR,
STATE OF MICHIGAN,
ATTORNEY GRIEVANCE COMMISSION,

Petitioner-Appellant,

-vs-

S Ct #127547
ADB #01-055-GA

GEOFFREY N. FIEGER, P30441,

Respondent-Appellee.

BRIEF ON APPEAL – RESPONDENT-APPELLEE

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The Attorney Discipline Board said, "Yes".
Petitioner-Appellant says, "No".
Respondent-Appellee says, "Yes".

II.

MR. FIEGER'S HYPERBOLIC, SATIRICAL PUBLIC STATEMENTS ABOUT THREE JUDGES WERE MANIFESTLY POLITICAL SPEECH PROTECTED BY U.S. CONST, AM I & XIV, AND CONST 1963, ART 1, §5.

The Attorney Discipline Board said, "Yes".
Petitioner-Appellant says, "No".
Respondent-Appellee says, "Yes".

III.

BECAUSE RESPONDENT-APPELLEE'S PUBLIC CRITICISMS OF THREE JUDGES OF THE COURT OF APPEALS DID NOT OCCUR BEFORE THE TRIBUNAL, NEITHER MRPC 3.5(c) NOR 6.5(a) WAS VIOLATED.

The Attorney Discipline Board plurality said, "Yes".
Petitioner-Appellant does not address this issue.
Respondent-Appellee says, "Yes".

COUNTER-STATEMENT OF PROCEEDINGS AND FACTS

Introduction

For the past decade, a pitched battle has raged in Michigan's legislature and courts over the rights of victims of discrimination, medical malpractice and corporate irresponsibility. At stake is whether these individuals will have meaningful access to the courts and fair compensation for their frequently devastating injuries. The principal participants in this intense struggle have been insurance companies, trade associations, labor unions, politicians, lawyers *and* — in this state in which all judges are elected — judges.[1]

During John Engler's tenure as governor, the state's Republican-controlled legislature — at the urging of supporters such as the Michigan Chamber of Commerce, the Michigan Manufacturers Association and the Michigan State Medical Society, and over the vigorous opposition of the state's

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[1]For example, in a May 17, 2000, speech to the Michigan State Medical Society, Justice Markman referred to plaintiffs' personal injury lawyers as "*our opponents*, the people who quite frankly make a livelihood by suing you and those who you represent" (emphasis added). In the same speech, Justice Markman boasted that Michigan was the only state in which medical malpractice "reform" had been upheld; he also asserted that those opposing his and his Republican-nominated colleagues' election "hated" the Court [See Exhibit A to Answer to Application for Leave to Appeal].

Opposition to "trial lawyers" in general and Mr. Fieger in particular – even though Mr. Fieger was not a candidate for any office that year – was central to the 2000 campaigns of Justices Taylor, Young and Markman: In an August 26, 2000, speech to the Michigan Republican Party convention, Justice Young claimed that "Geoffrey Fieger and his trial lawyer cohorts hate this court. There's honor in that" [See Exhibit B to Answer to Application for Leave to Appeal]; the September 3, 2000, Owosso Sunday Independent reported that, at a fund-raiser four days earlier, Justice Young had claimed that "Geoffrey Fieger currently has $90 million of lawsuit awards pending in the state Court of Appeals" [See Exhibit C to Answer to Application for Leave to Appeal]; a political advertisement supporting Justices Taylor, Young and Markman titled "He's back ..." featured a photograph of Mr. Fieger and contended that Mr. Fieger was "trying to take over the Michigan Supreme Court"; the same ad characterized the Democratic-nominated candidates as "FIEGER's FRIENDS" and "the Fieger team".

Democratic party and organizations such as the Michigan Trial Lawyers Association — passed legislation dramatically reducing the rights of individuals damaged by corporations, employers, doctors, hospitals and others to obtain compensation for their injuries.[2] Organizations such as the Grand Rapids Area Chamber of Commerce and the Michigan Manufacturers Association openly boasted of their desire to re-shape Michigan's courts to support their desired policies, and they trumpeted their satisfaction when legislative and judicial electoral results went their way. *Cf.*, *e.g.*, September 24, 1999, issue of Michigan Manufacturers Weekly, which included the following statement in an article on Justice Markman's appointment to this Court:

> *During 1998-1999, MMA-PAC contributions swayed the Supreme Court election to a conservative viewpoint, ensuring a pro-manufacturing agenda ...*

(emphasis added); September 30, 1999, press release from the Grand Rapids Area Chamber of Commerce encouraging supporters to attend an October 4, 1999, reception to be attended by, *inter alia*, then-Chief Justice Weaver and Justices Taylor, Corrigan and Markman to raise funds for the election of

> pro-business legislators ... [and] pro-business judicial officials as well ... proceeds raised at the ... event will be used throughout next year's election cycle to support pro-business candidates at the state's legislative and judicial levels."

See also October 5, 1999, article from the Grand Rapids Press reporting that Justices Taylor, Corrigan, Young and Markman, in fact, attended the reception; see also Justice Markman's May 17, 2000, speech to the Michigan State Medical Society, *supra*, at n 2.

Within this Court, the on-going conflict has played itself out in bitterly contested cases that

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[2]*Cf.*, *e.g.*, MCLA §600.1483 (establishing limits on noneconomic loss damages); MCLA §§600.6303 and 600.6304 (eliminating joint and several liability).

have severely divided the Court along partisan lines.[3] The partisanship in these cases has been so extreme that, in at least one case in which Mr. Fieger was plaintiff's counsel, the competing statements of facts of the majority and dissenting justices read like they were drawn from entirely separate cases.[4]

As an uncommonly talented trial lawyer who has devoted his professional life to fighting for the rights of the disadvantaged, as the 1998 Democratic Party candidate for governor of Michigan, and as a national television and radio personality, Mr. Fieger has been a frequent combatant in this struggle. He has spoken consistently and passionately about his views of the injustices inflicted on the poor, and he has spoken out about the legal and moral responsibility of those in positions of power who, in his judgment, have perpetrated these injustices. Society's obligation to provide meaningful access to the courts to these victims was, in fact, a central theme of Mr. Fieger's gubernatorial campaign.

Mr. Fieger's outspokenness has earned him considerable popularity in many quarters around the state and across the nation; it has likewise left him viscerally disliked by others, including some of those in power. In fact, given the many public statements about him by members of this Court and the basis for this Court's decision in Gilbert v DaimlerChrysler, 470 Mich 749, 685 NW2d 391 (2004), any reasonably prudent Michigan attorney who follows this Court's decisions and the public statements of its members could fairly conclude that a majority of this Court is overtly hostile to Mr. Fieger.

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[3] *Cf.*, *e.g.*, Shinholster v Annapolis Hospital, 471 Mich 540, 685 NW2d 275 (2004); Kreiner v Fischer, 471 Mich 109, 683 NW2d 611 (2004); Gilbert v DaimlerChrysler Corp, 470 Mich 749, 685 NW2d 391 (2004); Waltz v Wyse, 469 Mich 642, 677 NW2d 813 (2004).

[4] *Cf.* Gilbert, *supra*, 470 Mich at 755-761, 793-806.

Just as those who hold public office — including judges — do not wait until shortly before election day before campaigning for re-election, those critical of public office-holders' acts cannot and do not wait until shortly before election day to make known their views of the officer-holders' fitness or lack thereof.[5]

The statements at issue in this case were made by Mr. Fieger in his capacity as a nationally recognized Democratic politician, trial lawyer and radio talk show host. Satirically and hyperbolically, he was roasting on his radio program three judges he believed had unfairly deprived a Michigan citizen of compensation that an Oakland County jury had found he was entitled to receive. These hyperbolic statements can only be properly understood in the context of this on-going, public, highly political battle.

Case History

In March 1993, Salvatore Badalamenti, a finish carpenter, suffered a heart attack. He sought treatment at William Beaumont Hospital-Troy. Mr. Badalamenti later developed gangrene, as a result of which both of his legs were amputated at the knee. His fingers and thumbs were also lost, effectively leaving him without hands.

Believing that this horrendous result was attributable to medical negligence when his cardiogenic shock was not appropriately treated, Mr. Badalamenti retained a lawyer in order to investigate the circumstances of his injuries. After investigation and the securing of a medical expert's opinion, the retained firm, in turn, retained Mr. Fieger's services to try the case in Oakland

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[5]Even more so than laws restricting the posting of political signs until shortly before an election – laws which themselves do not withstand constitutional scrutiny, *cf.*, *e.g.*, Dimas v City of Warren, 939 F Supp 554 (ED Mi 1996); Antioch v Candidates' Outdoor Graphic Service, 557 F Supp 52 (ND Cal 1982) – any attempt to limit campaign speech to a given time-frame would violate the First Amendment.

County Circuit Court. Badalamenti v William Beaumont Hospital-Troy, 237 Mich App 278, 281-282, 602 NW2d 854 (1999).

Mr. Fieger tried Mr. Badalamenti's case before a jury, which found in Mr. Badalamenti's favor, returning a large monetary award. The trial judge, the late Hon. Robert C. Anderson, denied the defendants' post-trial motions for relief from the judgment.

On August 20, 1999, shortly after Mr. Fieger's campaign for governor, a panel of the Court of Appeals reversed, concluding that the plaintiff had failed to present sufficient evidence of cardiogenic shock to the jury. Specifically, the panel uniquely held that plaintiff's expert's opinion was insufficient because it was "*inconsistent* with the testimony of a witness who personally observed an event in question, and the expert [was] unable to reconcile his inconsistent testimony other than by disparaging the witness' power of observation." 237 Mich App at 286 (emphasis added).[6]

In lengthy and strident dictum, the panel also gratuitously took aim at Mr. Fieger personally, alleging that he had engaged in such "egregious" conduct during the trial that the defendants would be entitled to a new trial even if reversal had not already been ordered. *Id.* at 289-294. The very experienced trial judge had not at any point during the trial sanctioned Mr. Fieger, however, and he had found no merit whatever in the defendants' post-trial motion for a finding of misconduct. *Id.* at 293. The panel nevertheless asserted that Mr. Fieger's conduct "far exceed[ed] permissible

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[6]The logic of the panel's holding, if applied in other cases, would preclude admission of any expert opinion testimony shown to be "inconsistent" with eyewitness testimony presented by the opposing party. Such a rule confers on "personally observed" testimony a wholly unwarranted status.

bounds". *Id.* at 289.[7]

Mr. Fieger firmly believed that the panel had done his client and him a grave injustice: Not only had the jury's award been taken away, the court had dismissed the case, precluding a re-trial. Mr. Fieger was also highly offended at the panel's unsubstantiated personal attack on him by judges he believed were political allies of his opponent in the previous year's gubernatorial race and that these judges were willing to sacrifice Mr. Badalamenti's legitimate claim for damages on the altar of "Get Fieger".

In addition to practicing law, in 1999 Mr. Fieger was employed by CBS Radio as the host of a radio talk show, "Fieger Time", a free-ranging talk program which was often political, satirical and/or comic and which began within weeks of the 1998 gubernatorial election. During broadcasts of "Fieger Time" on August 23 and 25, 1999 – three and five days *after* Badalamenti had been decided by the Court of Appeals; that is, *after* Mr. Badalamenti's case had been dismissed by the court – Mr. Fieger, in his capacity as a radio talk show host and victims' rights advocate, expressed his feelings about what the judges on the panel had done, their politics and their decision. His comments were the then-latest chapter in the ongoing struggle over the rights of victims of negligence and greed to obtain some measure of compensation in court.

On April 16, 2001, Petitioner-Appellant filed the one-count Formal Complaint in this case. The complaint, which Respondent asserts took his statements out of context, alleged that Mr. Fieger said --

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[7]Four justices of this Court similarly attacked Mr. Fieger's trial conduct in Gilbert, *supra*, in order to take the jury's verdict away from Ms. Gilbert on these same grounds despite a trial and appellate record which clearly contradicts the majority's claims. *Cf.* 470 Mich at 755-761, 793-806.

- "Hey Michael Talbot and Bandstra, and Markey, I declare war on you. You declare it on me, I declare it on you. Kiss my ass, too." ¶10(a),
- "lost both his hands and both his legs, but according to the court of appeals, he lost a finger. Well, the finger he should keep is the one where he should shove it up their asses." ¶10(b),
- "three jackass Court of Appeal [*sic*] Judges", ¶11(a),
- "I know the only thing that's in their endo should be a large, you know, plunger about the size of, you know, my fist", ¶11(b), and
- "They say under their name, Court of Appeals Judge, so anybody that votes for them, they've changed their name from, you know, Adolf Hitler and Goebbels, and I think -- what was Hitler's -- Eva Braun, I think it was, is now Judge Markey. I think her name is now Markey, she's on the Court of Appeals." ¶11(c).

Numerous other statements were made during the show by Mr. Fieger's associates on the program.

The Formal Complaint charged Mr. Fieger with violating MRPC 3.5(c) and 6.5(a) for making the above out-of-court statements. The Formal Complaint did *not* allege that *any* of Mr. Fieger's challenged statements were knowingly or recklessly false statements of fact, and it did *not* allege that any of his comments were likely to prejudice an adjudicative proceeding.

Mr. Fieger moved for summary disposition. In a May 21, 2002, opinion, the hearing panel denied the motion.

In late 2003, in order to address what he believed and the Board later concurred was the unconstitutional application of these rules to his out-of-court statements, Mr. Fieger entered a

conditional plea of no contest to the allegations of the Formal Complaint, *conditionally* accepting the imposition of a reprimand and specifically preserving his right to appeal the issues previously raised before the hearing panel. As a part of the conditional plea agreement, the Commission agreed to strike the allegations of ¶16 that Mr. Fieger's conduct allegedly violated MCR 9.104(A)(1)-(4) and MRPC 8.4(a) and (c). On January 9, 2004, the panel issued an order accepting the conditional plea.

On January 12, 2004, Mr. Fieger timely filed petitions for review and for stay of the hearing panel's order. MCR 9.118(A)(1) and 9.115(K).

On November 8, 2004, the Attorney Discipline Board issued its decision and an Order Vacating Hearing Panel Order of Reprimand and Dismissing Formal Complaint. In arriving at its conclusion, the Board plurality painstakingly analyzed the prior attorney and judicial officer First Amendment decisions of the United States Supreme Court and this Court, ultimately stressing that

> When our Supreme Court's opinions in Chmura I and Chmura II are read together and with the numerous United States Supreme Court opinions which support them, we must conclude that attorney statements which do not involve assertions of fact are protected by the First Amendment outside the context of a pending proceeding.

Board opinion at pp 22.

The Board's decision reaffirms that an attorney's non-factual out-of-court statements which are alleged to be "discourteous" – even when those statements are about judges – are absolutely protected by the First Amendment and that arguments to the contrary are incompatible with the fundamental American right to freedom of expression.

STANDARD OF REVIEW

Petitioner-Appellant has correctly identified the standard of review applicable to each of the issues presented in this appeal.

ARGUMENT

I.

AS THE ADJUDICATIVE ARM OF THIS COURT FOR ATTORNEY DISCIPLINE MATTERS, THE ATTORNEY DISCIPLINE BOARD HAS THE AUTHORITY TO CONSIDER CONSTITUTIONAL ISSUES PRESENTED; BECAUSE ITS RULING IN THIS CASE DID NOT FIND ANY RULE OF PROFESSIONAL CONDUCT TO BE UNCONSTITUTIONAL, THIS CASE PRESENTS NO ISSUE REGARDING THE BOARD'S AUTHORITY TO DECLARE A RULE UNCONSTITUTIONAL.

On the one hand, the Administrator argues that the Attorney Discipline Board lacks authority to declare a rule of professional conduct unconstitutional; on the other, it concedes that the Board has the authority to consider constitutional principles in its decision-making. Petitioner's Brief at pp 3-7. The Administrator cites no authority for the unique proposition that the Board has some authority to consider constitutional law questions but only up to a point. The absence of any such authority reveals the complete lack of merit of the Administrator's argument.

In its ruling below, the Board did *not* declare any rule of professional conduct to be unconstitutional. In the event the Board ever finds a rule to be unconstitutional in a future case, the issue raised by the Administrator will become ripe for this Court's consideration. For purposes of this case, however, the argument is not only disingenuous and misleading, it is utterly beside the point.

Consistent with its duty to apply all relevant law to the facts and issues at hand, the Board

quite unremarkably considered prior decisions of this Court and the United States Supreme Court in concluding that MRPC 3.5(c) and 6.5(a) should be construed in such a manner as to *avoid* a constitutional problem. Board Opinion at p 15. There is a marked difference between finding a rule or statute unconstitutional and construing it in such a manner as to avoid an unconstitutional application, a power the Administrator concedes to the Board. Brief at pp 6-7.

The "Attorney Discipline Board is the adjudicative arm of" this Court "for discharge of its exclusive constitutional responsibility to supervise and discipline Michigan attorneys". MCR 9.110(A). Among its duties is review of hearing panel orders of discipline and dismissal, MCR 9.118(E)(4), including the authority to "affirm, amend, reverse, or nullify the order of the hearing panel, in whole or in part or order other discipline." Grievance Administrator v Grimes, 414 Mich 483, 489, 326 NW2d 380 (1982).

Moreover, "[e]xcept as otherwise provided in these rules, the rules governing practice and procedure in a nonjury civil action apply to a proceeding before a hearing panel". MCR 9.115(A). Since issues of constitutional law may be raised in non-jury civil actions and no rule prohibits either the Administrator or a respondent attorney from raising issues of constitutional law before a hearing panel, it may reasonably be inferred that hearing panels appointed by the Board, MCR 9.110(E)(2), have the authority to consider such questions. Since it would be absurd for hearing panels to have greater authority to consider constitutional law questions than does the Board, Rule 9.115(A) is further evidence of the Board's authority to consider such questions.

Given the broad range of issues which come before the Board and the regularity with which issues of constitutional law are intertwined with those issues, it would make no sense for the Board's authority not to include the authority to consider questions of constitutional law. Not only does the

Board from time to time consider questions of political speech, with their attendant First Amendment implications, it also considers questions of commercial speech, with their attendant First Amendment implications,[8] issues of the Fifth Amendment privilege,[9] issues of due process[10] and other constitutional law issues. In Grievance Administrator v MacDonald, ADB #00-190-GA (2002), the Board well-stated its relationship with this Court and its responsibilities regarding issues of constitutional law:

> The attorney discipline process does not operate in a constitutional vacuum. Rather, the Attorney Discipline Board acts in conformity with its statutory grant of authority and is cognizant of both federal and state case law precedent regarding constitutional issues.

Quoting from Grievance Administrator v Tucker, ADB #94-12-GA (1995), lv den 449 Mich 1206 (1995), the Board spoke to its approach for considering questions of constitutional law:

> "As the adjudicative arm of the Michigan Supreme Court for attorney discipline matters this Board is not infrequently faced with claims that a respondent's constitutional rights have been or will be jeopardized in the course of disciplinary proceedings. While recognizing its limited grant of authority, the Board has considered such claims and has applied constitutional precedents in the context of the discipline matters before it."[11]

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[8]Grievance Administrator v Moffett, ADB #103/84 (1985) (considering relationship of Bates v Arizona, 433 US 350 (1977), to then-applicable rules regarding attorney advertising).

[9]Grievance Administrator v Eston, ADB #75/85 (1987).

[10]Grievance Administrator v Clark, ADB #95-59-GA (1997) (considering relationship between due process and lengthy delay in the filing of a formal complaint).

[11]Consider also Fieger v Thomas, 74 F3d 740, 747 (6th Cir 1996), where the Sixth Circuit observed that

> Like the Ethics Committee in New Jersey, the Board "constantly [is] called upon to interpret the state disciplinary rules." Even if the Board could not declare a Rule of Professional Conduct unconstitutional – a proposition about which we are not convinced – "it would seem an unusual doctrine, and one not supported by the

Considering the infrequency with which this Court takes up questions involving the attorney discipline system, in the vast bulk of cases presenting questions of constitutional law the Board is the only review tribunal before which those questions will be considered. Considering also that, unlike the attorney discipline systems of most other states, *cf.* Wolfram, Modern Legal Ethics (West) §3.4.5, Michigan's system does not provide for a right of judicial review, the practical need for Board authority adequate to consider all questions presented to it is particularly great. If the Board were held to lack the authority to consider constitutional questions, neither an attorney charged with professional misconduct nor the Administrator would have a right to have their constitutional concerns addressed before *any* review tribunal. This would be both an unconstitutional procedure and bad policy. It would leave the Board with responsibilities far in excess of the tools necessary to carry out those responsibilities, and it would leave Michigan lawyers with no guaranteed forum in which infringements of their constitutional rights could be corrected.

Construing the Board's authority to preclude full consideration of constitutional law would raise extremely serious due process concerns. In the absence of either Board authority to consider questions of constitutional law or a right to judicial review of the Board's decisions, the central reason heretofore for federal abstention from intervention in attorney discipline proceedings would be eliminated. As the United States Supreme Court noted in Middlesex County Ethics Committee v Garden State Bar Association, 457 US 423, 432, 102 SCt 2515, 73 LEd2d 116 (1982),

> Where vital state interests are involved, a federal court should abstain "*unless state*

> cited cases, to say that the [Board] could not construe [the Rules of Professional Conduct] in the light of federal constitutional principles."*Ohio Civil Rights Comm'n v. Dayton Christian Sch.*, 477 U.S. 619, 629, 91 L. Ed. 2d 512, 106 S. Ct. 2718 (1986). The Board could, short of declaring a Rule unconstitutional, refuse to enforce it or, perhaps, narrowly construe it.

law clearly bars the interposition of the constitutional claims..."

(cite omitted; emphasis added). See also Fieger v Thomas, 74 F3d 740, 748 (6th Cir 1996) ("as the Supreme Court explained in *Dayton Christian Schools,* 'it is sufficient under *Middlesex* that constitutional claims may be raised in state-court review of the administrative proceeding.'").

With respect to the constitutional significance of a right to judicial review, see Statewide Grievance Committee v Presnick, 215 Conn 162, 169, 575 A2d 210 (1990) ("'In [presentment] proceedings such as this a defendant is entitled to notice of the charges against him, to a fair hearing, and a fair determination, in the exercise of a sound judicial discretion, of the questions at issue, and to an appeal to this court for the purpose of having it determined whether or not he has in some substantial manner been deprived of such rights.'" (cite omitted)); Amsden v Moran, 904 F2d 748, 755 (1st Cir 1990) ("The availability of judicial review is an especially salient consideration in situations where permits and licenses have been denied or revoked by state or local authorities in alleged derogation of procedural due process.").

The practicalities of the attorney discipline system strongly argue in favor of the Board's authority to consider constitutional law questions. While the Administrator raises the specter of a run-away Board undercutting this Court's rules, its fears are wholly unsupported by experience or logic. To the contrary, the Board's authority to consider questions of constitutional law provides an important opportunity for the Board to *implement* decisions of this Court and the United States Supreme Court which impact on the attorney discipline process but which have not yet been addressed by this Court and which this Court would be very unlikely to address as promptly.

For example, at the time the United States Supreme Court substantially expanded the permissible scope of attorney advertising in Shapero v Kentucky Bar Association, 486 US 466, 108

SCt 1916, 100 LEd2d 475 (1988), MRPC 7.3 precluded virtually all solicitation of prospective clients other than those with whom the lawyer had a family or prior professional relationship. In order to conform the rule to the Court's holding in Shapero, this Court amended the rule effective January 1, 1990.[12] Shapero, however, had been decided in June 1998 and was decided on First and Fourteenth Amendment grounds. If the Board had been unable either to declare the prior version of MRPC 7.3 unconstitutional or to construe it in light of Shapero in the one and a half years between the time Shapero was decided and the date on which the amended rule became effective, any case charging an attorney with violating Rule 7.3 for conduct protected by Shapero would have been, at best, left in unnecessary limbo; at worst, attorneys whose conduct was constitutionally protected would have been convicted of misconduct pursuant to a rule which had become obviously unconstitutional.[13]

While the Administrator is admittedly free to reverse position on an issue from one case to

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[12]The amendment added the language "nor does the term 'solicit' include 'sending truthful and nondeceptive letters to potential clients known to face particular legal problems' as elucidated in *Shapero v Kentucky Bar Ass'n*" (cite omitted).

[13]Other examples could arise as a result of decisions of this Court interpreting the Michigan constitution. It is possible, for example, that this Court could one day determine in a licensing proceeding involving a registered nurse that the Michigan constitutional right to counsel in criminal cases, Const 1963, art 1, §20, extends to a right to appointed counsel for an indigent nurse respondent in those quasi-criminal proceedings. Without having had an attorney discipline case before it at the time, the Court's ruling would not on its face apply to attorney discipline proceedings. Nevertheless, assuming the logic of the Court's decision extended to all professional licensing proceedings, *cf.* also American Bar Association Model Rules for Lawyer Disciplinary Enforcement, Rule 34 (counsel for indigent respondent), it would make no sense whatever to preclude the Board from applying the nursing case ruling to any pending attorney discipline case presenting the same question. While such a ruling by the Board would mean that the Board was, in a narrow sense, engaging in a rule-making function which is otherwise the responsibility of this Court, it would be an entirely sensible and practical act furthering, not frustrating this Court's jurisprudence.

the next, doing so necessarily raises questions as to the reasons for any such change. In its repeated and presumably carefully considered argument in Fieger v Thomas, *supra*, that the Board has the authority to consider constitutional claims,[14] the Administrator told the Sixth Circuit that the Board had the authority to rule on constitutional issues. At the time, taking that position would hopefully – and did, in fact – avert a federal court challenge to Michigan's attorney discipline system procedures. The Administrator is now arguing precisely the opposite in a case where the Board has ruled against him in reliance, in part, on constitutional principles. The hypocrisy of the Administrator's position necessarily leads one to wonder whether the Administrator would hesitate to reverse course yet again if, in a different case, the constitutional shoe were on the other foot.

The Administrator's reliance on Wikman v City of Novi, 413 Mich 617 (1982), is misplaced. The Tax Tribunal, unlike the Board, is not a judicial branch body; it is within the Department of Treasury. MCLA §205.721. Moreover, the Administrator misstates the cited language. This Court in Wikman did not make the flatly prohibitory statement attributed to it by the Administrator, Brief at p 6; the Court's actual language prefaces the quoted language with the limiting words "Generally speaking". 413 Mich at 646. Further, the Wikman plaintiffs were not seeking invalidation of a statute on constitutional grounds.

Finally, the Administrator's argument that the presence of three lay members on the Board is inconsistent with authority to consider questions of constitutional law, Brief at p 6, is a non-sequitur. Each member of the Board has the same authority and responsibility to consider the issues

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[14]"[C]ounsel for the Commission has stated in her briefs and oral argument before the district court and the appellate panel that the hearing panel and the Board are not precluded from hearing Fieger's constitutional claims." 74 F3d at 747.

presented to the body, and this Court presumably considers the full range of a prospective appointee's competence before appointing any member to the Board. Non-lawyers in positions of public trust are, in fact, frequently called upon to consider issues of constitutional law. School boards and library boards, for example, frequently consider issues involving the First Amendment, and school boards are often called upon to consider Fourth Amendment issues as well. Legislatures regularly consider a broad range of constitutional law questions. Each of these bodies is routinely comprised of non-lawyers and lawyers alike. Not only are non-lawyers competent to consider issues of constitutional law, the complexity and subtlety of many of the ethics issues considered by the Board equal or exceed that of some constitutional law questions.

In sum, the question of the Board's authority to declare a rule of this Court unconstitutional is not properly before the Court, and the Court should not consider the question; alternatively, the Board's authority to construe the rules of professional conduct to avoid an unconstitutional construction or, as appropriate, to find a rule unconstitutional should be explicitly affirmed by this Court.

II.

MR. FIEGER'S HYPERBOLIC, SATIRICAL PUBLIC STATEMENTS ABOUT THREE JUDGES WERE MANIFESTLY POLITICAL SPEECH PROTECTED BY U.S. CONST, AM I & XIV, AND CONST 1963, ART 1, §5.

There is no question that if the statements at issue in this case had been made by a non-lawyer, the maker of the statements could have suffered no legal consequences whatever as a result of the utterance. All would agree that these statements were completely protected by the First Amendment. If a non-lawyer colleague of Mr. Fieger's on his radio show, rather than Mr. Fieger, had made the remarks at issue, no action could be taken. Similarly, if Mr. Fieger or any other attorney had made comparable remarks regarding a member of the legislature or the state's governor or attorney general, the remarks would not be actionable.

The question then becomes whether there is a compelling state interest justifying a restriction on this fundamental right. That is, is there something so overwhelmingly significant about an attorney's status as a member of the Bar and about the status of the judicial branch in relation to its presumptively co-equal branches of government that this cherished right to speak out may be abridged as to an attorney's mere statements made outside of a courtroom setting after a case has been decided? Simply but emphatically, there is not.

It also cannot be stressed strongly enough that, as a practical matter, the First Amendment *primarily* protects repulsive speech: *Speech which does not offend persons in power requires no protection from persons in power.*

The broad protections of the First Amendment exist not just to provide ample breathing room for the *speaker's* right to free expression. They exist also to protect the right of the citizenry to